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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1973

No. 73-481

HOUSTON NATURAL GAS CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT S. BAMBACE
HUGH E. HACKNEY

Attorneys for Houston Natural Gas Corporation

Of Counsel,

FULBRIGHT, CROOKER & JAWORSKI
1018 Bank of the Southwest Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not yet officially reported, but appears at 83 LRRM 2220. The Decision and Order of the National Labor Relations Board, hereinafter referred to as the "Board," is reported at 198 NLRB No. 35, 81 LRRM 1032 (1972). The Denial of the Petition for Rehearing and for Rehearing En Banc by the Fifth Circuit Court of Appeals is reprinted herein as Appendix A; the Opinion of the Fifth Circuit Court of Appeals is reprinted herein as Appendix B; the Decision and Order of the Board is reprinted herein as Appendix C; and the Decision of the Regional Director of the Twenty-Third Region of the Board is reprinted as Appendix D.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered July 13, 1973. This petition is being filed within ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

Whether the Court below erred in its implicit holding that the Record as a whole including the evidence opposed to the Board's point of view, supports the finding by the Board that Houston Natural Gas Corporation violated Sections 8(a)(1) and Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5) (1970), hereinafter referred to as the "Act," by refusing to bargain with the certified representative of its employees in an appropriate unit?

Whether the Court below erred in its implicit holding, contrary to the holdings of several United States Courts of Civil Appeals, that an individual is eligible to vote in a Board election where he possesses certain indicia of supervisory authority?

Whether the Court below erred in its implicit holding, contrary to the holdings of several United States Courts of Civil Appeals, that an employer should be denied a hearing when post-election objections created substantial and material fact issues?

STATUTORY PROVISIONS INVOLVED

Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1970), provides:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire,

> transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1970), provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(5) (1970), provides:

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Fifth Circuit enforcing an Order of the National Labor Relations Board, hereinafter referred to as "Board." The Board found that Houston Natural Gas Corporation, hereinafter referred to as "Company," had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, by failing to negotiate with the certified representative of its employees for purposes of collective bargaining because certain company employees designated as supervisors by the Company were allowed to campaign for the International Union of Operating Engineers, Local No. 347, AFL-CIO, hereinafter referred to as "Union", and were allowed to vote in the National Labor

Relations Board election held November 16, 1971 at the Company's plant in Houston, Texas.

It is undisputed that the Company refused to negotiate with the Union pending a final determination by the United States Courts of the issue involved in this case. This case simply involves the question of whether or not an individual deemed to possess supervisory status by the Company and whose own testimony indicates he possesses supervisory status should be allowed to vote and to campaign for the Union during a Board election.

The Company is a Texas corporation engaged in the transmission, distribution and sale of natural gas to residential, industrial and commercial customers. By a Decision and Direction of Election dated October 22, 1971, Appendix D *infra*, the Acting Regional Director of the Twenty-Third Region of the Board ordered an election among: "All operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices, employed by the [Houston Natural Gas Corporation] . . . Houston, Texas, excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined in the Act."

The Company filed a Request for Review of the Decision and Direction of the Election on the grounds that the Acting Regional Director by his Order included within the unit supervisors as defined by Section 2(11) of the Act and allowed the Union to make its showing of interest by means of authorization cards it had obtained at the incipiency of the Union's organizational campaign with the active support of one of the Company's supervisors. On November 16, 1971, a secret ballot election resulted in a Union victory by a margin of nine votes to three votes with five challenged ballots. Thereafter, the Company filed timely Objections to Conduct Affecting the Results of the Election, specifically objecting to the fact that a Union representative entered

into the voting area wearing a Union button; that a supervisor known to be a Union supporter voted in the election; and that a supervisor known to be a Union supporter remained in the immediate vicinity of the polling place and campaigned for the Union.

On November 24, 1971, the Regional Director, Clifford Potter, hereinafter referred to as "Regional Director," sent the Attorney for the Company a letter advising him that the Company as Objecting Party was required to furnish evidence to provide a prima facie case to support its Objections. The letter advised that the Company's Objections would be overruled unless evidence was submitted within five days of the receipt of the letter by the Company Attorney. The letter was received by the Company Attorney on December 6, 1971. Prior to the Company Attorney's receipt of the letter, the Regional Director entered a Supplemental Decision, Order and Certification of Representative on December 3, 1971, denying the Company a hearing at which to present its evidence. On December 15, 1971, the Company filed a Request for Review of the Regional Director's Supplemental Decision, Order and Certification of Representative, objecting to the Regional Director's denial of a hearing on its Objections. Finally, on December 29, 1971, the Board denied the Request for Review stating it raised no substantial issues warranting review.

Nathan Kitchens' affidavit sets out his duties as a Lead Operator with the Company. Initially, Kitchens stated that his salary was $725 a month, and that he had the authority to recommend discharge or transfer of unsatisfactory employees. He also stated that he sent an employee home for reporting to work intoxicated and that he had authority to hold employees over for overtime work.

Kitchens admitted he had attended two to four Union meetings along with other employees and was present when ten of the Union's authorization cards were signed. He also

admitted signing letters for the Union and advocating the Union in discussions with other employees at Union meetings.

In the subsequent unfair labor practice proceeding, the Board imprudently granted the General Counsel's Motion for Summary Judgment and found all issues raised by the Company were or could have been litigated in the prior representation proceeding. It is obvious that a fact issue was raised by the newly discovered evidence concerning the status and election conduct of Lead Operator Nathan Kitchens which the Board failed to review. This evidence was never brought to the Board's attention because the Board granted the General Counsel's Motion to Strike the Company's Supplemental Opposition to the Motion for Summary Judgment on the ground that there was no showing that the evidence could not have been produced in the representation proceeding or that special circumstances warranted re-examination of the Board's determination proceeding.

REASONS FOR GRANTING THE WRIT

I.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS BY ALLOWING A COMPANY SUPERVISOR TO CAMPAIGN AND VOTE IN A BOARD ELECTION.

The Courts have long held that the possession of any one of the indicia of supervisory authority found in Section 2(11) of the Act is sufficient to clothe an individual with the status of a supervisor. *See e.g., NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969). While it is recognized that the Board has great discretion to determine who falls within the statutory definition, the Company submits that since Nathan Kitchens meets several of the necessary

statutory criteria, he is clearly a supervisor. The undisputed facts in this case indicate that Kitchens meets at least one of the necessary criteria noted in *Little Rock Downtowner, Inc., supra.* For example, he had the authority to report on the quality of the work and the authority to recommend discharge. The Board and Courts have held that such authority endows an individual with supervisory status as that term is defined by the Act. *Benson Veneer Co., Inc.,* 156 NLRB 781 (1966), *enf'd in part, vacated in part, Benson Veneer Co.* v. *NLRB,* 398 F.2d 998 (4th Cir. 1968; *Mon River Towing, Inc.* v. *NLRB,* 421 F.2d 1 (3rd Cir. 1969). It is clear that this employee met the requirements for supervisory status found in numerous Board cases and Court decisions and, therefore, should be held to be a supervisor within the meaning of the National Labor Relations Act.

If the position taken by the Acting Regional Director and the Board is accepted as being correct, then Company employees who work under Nathan Kitchens' supervision would spend a majority of their time working without any supervision. The Acting Regional Director and the Board relied on the testimony of a Company employee that on at least one occasion, Lead Operator Kitchens called another Chief Operator for Maintenance Operators and stated that he had no authority to call out Maintenance Operators. The Acting Regional Director and the Board ignored the testimony of the Company employee that this was an isolated instance and that Lead Operator Kitchens routinely called people out to work without checking with anyone. In cases like this, the factor weighed by the Board is the remoteness of other supervision. *Gary Aircraft Corp.,* 151 NLRB 7 (1965), *enf'd NLRB* v. *Gary Aircraft,* 368 F.2d 223 (5th Cir. 1966), *cert. denied* 387 U.S. 918 (1967).

The current collective bargaining agreement between the Company and the Union at a different plant was also relied on by the Acting Regional Director and the Board as being determinative of the supervisory issue. This consensual agreement of the parties to include a classification of workers in a contractual unit at a separate and distinct plant having a full time chief operator is not persuasive and certainly should not be controlling in this case. *Amalgamated Clothing Workers of America* v. *NLRB*, 365 F.2d 898 (D.C. Cir. 1966); *Heights Funeral Home, Inc.* v. *NLRB*, 385 F.2d 879 (5th Cir. 1967).

The Acting Regional Director found that the Record was not sufficiently clear to make a finding as to the supervisory status of the Company's Lead Operator Kitchens. At the representation hearing, the Company offered to show that Petitioner's showing of representative interest was secured through the efforts and assistance of a supervisor from the incipiency of the Union's organizational campaign and was, therefore, invalid. The Company's offer of proof was rejected by the Hearing Officer.

The statements of Kitchens in his affidavit clearly indicating supervisory authority were obviously a factor in the Acting Regional Director's reluctance to conclude Kitchens was not a supervisor. In his affidavit, Kitchens stated that he had been working with two of the Company's third grade operators. He stated that he receives higher compensation than they do and that it is his duty to train these operators and instruct them as to the manner in which their work is to be done. He further admitted authority to call in replacements for employees who become ill or who do not come to work, send ill employees home, recommend unsatisfactory employees be discharged or transferred off his shift, send employees home who report intoxicated, schedule overtime, and call in all employees if an emergency

develops. He also told of recommending an employee to be promoted and admitted that the employee was subsequently promoted. Employees possessing similar authority have consistently been excluded from voting units. *See, e.g., Jas. H. Matthews & Co.* v. *NLRB,* 354 F.2d 432 (8th Cir. 1965), *cert. den.* 384 U.S. 1002 (1966).

When questioned about his organizational activities on behalf of the Union, Kitchens admitted that he attended several Union meetings along with various other central plant employees and apprentices. He also admitted being present at the Union office on or about July 21, 1971, at the time *all* the Union's authorization cards were signed by the employees. He admitted signing a letter to the Company requesting that it recognize the Union and urging the good points of the Union in discussions with employees at the Union meetings. At the hearing, employee William S. Cochran, a Union witness, testified that Kitchens had been wearing a Union button prior to the election.

In a small unit such as the Houston Natural Gas Corporation facility involved here the open pro-Union stance of Lead Operator Kitchens along with his presence at the signing of the Union's authorization cards is reason enough to set aside the election. The presence of the man who directs employees' work, recommends their raises, recommends their discharge, reports on their performance, grants their time off, and holds numerous lesser powers over their workday as they decided whether to sign authorization cards and how to vote indicates the absence of a free and untrammeled choice on the part of the employees.

Based on the reasons stated, the cases cited and the affidavit of Lead Operator Kitchens, he should have been found to be a supervisor within the meaning of the statute and excluded from the unit.

II.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF SEVERAL CIRCUITS BY DENYING THE COMPANY A HEARING WHERE POST-ELECTION OBJECTIONS CREATED SUBSTANTIAL AND MATERIAL FACT ISSUES.

The various Federal Circuit Courts have consistently ruled that they will not enforce Board orders to bargain where the Board's own decision shows that timely election objections were disposed of erroneously as a matter of law, or where material objections were considered separately and not cumulatively, or where post-election objections created substantial and material fact issues which the Board disposed of without granting the employer a hearing. *Trade Winds Co.* v. *NLRB*, 413 F.2d 1213 (5th Cir. 1969); *NLRB* v. *Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968); *Sonoco Products Co.* v. *NLRB*, 399 F.2d 835 (9th Cir. 1968); *NLRB* v. *Ortronix, Inc.*, 380 F.2d 737 (5th Cir. 1967); *Home Town Foods, Inc.* v. *NLRB*, 379 F.2d 241 (5th Cir. 1967); *U. S. Rubber Co.* v. *NLRB*, 373 F.2d 602 (5th Cir. 1967); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627 (2d Cir. 1963); *NLRB* v. *West Texas Utilities Co.*, 214 F.2d 732 (5th Cir. 1954). In *Joclin Mfg. Co.*, 314 F.2d at 631-32, the Second Circuit ruled as follows:

> "In consequence, a court cannot properly enforce an order finding an employer guilty of an unwarranted refusal to bargain with a union certified in an election if it appears, with respect to challenges affecting the results, *either that they were disposed of erroneously as a matter of law or that the employer raised 'substantial and material factual issues' under the Regulations and was denied a hearing. . . .*" (Emphasis supplied.)

Furthermore, it is also abundantly clear under controlling Court and Board authorities that the Board erroneously "rubber-stamped" the Regional Director's Decision that the Company had failed to present evidence in support of its Objections and the election results should be binding. The General Counsel argues that Respondent relies on precisely the same evidence which the Regional Director and the Board have already considered and that it should "be bound by the decision of the Board in the representation case." This ruling clearly misapplied applicable legal principles. *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB,* 409 F.2d 676 (2d Cir. 1969); *NLRB* v. *Trancoa Chemical Corp.,* 303 F.2d 456, 461 (1st Cir. 1962).

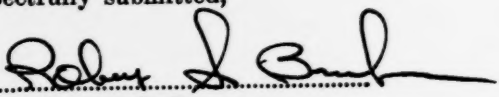
In *Trancoa Chemical,* the First Circuit refused to enforce a Board bargaining order against an employer because the Court determined that the Board was erroneous in not overturning the union's election victory on the basis of the employer's timely post-election objections. The Court further ruled that the Board's corollary ruling — that the Trial Examiner at the unfair labor practice hearing could reconsider no matters previously denied — was in error. In so ruling, the Court held in part as follows:

> "The act provides that employees shall have representatives 'of their own choosing' . . . . We do not think that the Board's view of what impairs freedom of choice is more sacrosanct than its other fact-finding powers. *Likewise, the Board's corollary ruling that the trial examiner at the unfair labor practice hearing could reconsider no matters previously decided was error.* Respondent is entitled to have all of the misrepresentations viewed together." (Emphasis supplied.) 303 F.2d at 461.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

By 

ROBERT S. BAMBACE
HUGH E. HACKNEY

Attorneys for Houston Natural Gas Corporation

Of Counsel,

FULBRIGHT, CROOKER & JAWORSKI
1018 Bank of the Southwest Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

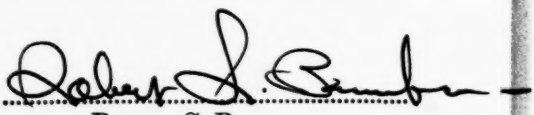
I, Robert S. Bambace, attorney for Houston Natural Gas Corporation, do hereby certify that on this the 14th day of September, 1973, copies of the foregoing Petition for A Writ of Certiorari have been served upon the following:

Erwin N. Griswold
Solicitor General
United States Department of Justice
Washington, D. C. 20530

Peter G. Nash
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

International Union of Operating Engineers,
Local Union No. 347, AFL-CIO
7016 Gulf Freeway, Suite 225
Houston, Texas 77017

by mailing the same through the United States mail, postage prepaid.



ROBERT S. BAMBACE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3460

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HOUSTON NATURAL GAS CORP.,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 18, 1973, 5 Cir., 1973, ... F.2d .....).

(July 13, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

1-B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3460

SUMMARY CALENDAR[1]

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HOUSTON NATURAL GAS CORP.,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(May 18, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge: On August 21, 1972, the National Labor Relations Board found that Houston Natural Gas Corporation engaged in an unfair labor practice in violation of sections 8(a)(1) and (5) of the National Labor Relations Act of 1947, 29 U.S.C. §§ 158(a)(1) and (5)

[1] Rule 18, 5 Cir.; *see* Isbell Enterprises Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

(1971), by refusing to bargain collectively with the International Union of Operating Engineers, Local No. 347, AFL-CIO, as the exclusive bargaining representative for "operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices." Upon petition of the NLRB pursuant to section 10(e) of the Act, 29 U.S.C. § 160(e) (1971), we grant enforcement of the order *inter alia* compelling the company to bargain collectively with the union.

On the initial question regarding the appropriate bargaining unit, section 10(e) limits our factual review to determine whether the Board's conclusions are supported by substantial evidence on the record considered as a whole. *See also Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 477, 71 S.Ct. 456, 459 (1951). Then we must determine whether the Board's application of a statutory term has a reasonable basis in law. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 131, 64 S. Ct. 851, 861 (1944). This limited scope of review is justified, because as the Supreme Court said in *National Labor Relations Board* v. *Erie Resistor Corporation,* 373 U.S. 221, 236, 83 S.Ct. 1139, 1150 (1963), "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life." Houston Natural Gas Corporation contends that operators A are "supervisors" within the meaning of section 2(11), 29 U.S.C. § 152(11) (1971), and, therefore, should be excluded from the bargaining unit under sections 2(3) and 7, 29 U.S.C. §§ 152(2), 157 (1971), which limit a bargaining unit to employees who are not supervisory personnel. After noting that lead operators have no authority to hire or discharge employees but can recommend employees be given raises or promotions, the Acting Regional Director who initially handled the case stated in his decision:

> Although the operators A may to some extent direct the work of other employees and undoubtedly are responsible for the operation of complex machinery and equipment when they are in charge of a shift, it is apparent that their relationship to other employees is more that of highly skilled employees to ones with less skill, and that whatever control they exercise derives from their greater skill, experience and responsibility. Accordingly, based on the foregoing, and the entire record, I find that operators A are not supervisors, and include them in the unit herein found appropriate.

The NLRB denied review for the reason that the company raised no substantial issues, and we find this decision under section 9(b), 26 U.S.C. § 159(b), is supported by substantial evidence and has a reasonable basis in law.

The company at another of its plants entered into a collective bargaining agreement covering a unit which includes operators A. Under these circumstances, we do not believe routine and limited control over employees makes them supervisors.[2] *See Ross Porta-Plant, Inc.* v. *National Labor Relations Board,* 5 Cir., 1968, 404 F.2d 1180; *National Labor Relations Board* v. *Security Guard Serv., Inc.,* 5 Cir., 1967, 384 F.2d 143. *See also National Labor Relations Board* v. *American Oil Co.,* 7 Cir., 1967, 387 F.2d 786, *cert. denied,* 391 U.S. 906, 88 S.Ct. 1056 (1968); *Northern Virginia Steel Corp.* v. *National Labor Relations Board,* 4 Cir., 1962, 300 F.2d 168, 170-72; *International Union of United Brewery* v. *National Labor Relations Board,* D.C. Cir., 1961, 298 F.2d 297, 302-03, *cert. denied,* 369 U.S. 843, 82 S.Ct. 875 (1962); *National Labor Relations Board* v. *Swift & Co.,* 9 Cir., 1957, 240 F.2d 65.

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[2] There is no change of policy involved in this case which would require the Board to exercise rule-making procedures, such as were ordered in Bell Aerospace Co. v. National Labor Relations Board, 2 Cir., 1973, ... F.2d ..... (82 LRRM 2753, February 28, 1973).

Following the bargaining unit's election which resulted in an affirmative vote for the union, the company filed several objections to the election procedure. On November 23, 1971, the Regional Director sent a letter to the company's counsel advising him:

> [U]nder Board policy and well-established case law, the burden is upon you, as the objecting party, to furnish evidence to prove a *prima facie* case in support of your objections. Therefore, unless said evidence is submitted *forthwith* (within 5 working days from receipt of this letter), the objections will be overruled. Generally speaking, and as a minimum, this should include a list of the witnesses, their addresses and telephone numbers, and a brief description of the testimony of each. In this regard, you should not "piecemeal" the submission of evidence but should disclose promptly all the evidence in support of your objections.

The post office certification indicates that the letter was received by the law firm on November 24, 1971. The Regional Director waited until December 3, 1971 without any response from counsel. Then the Director certified the union as the bargaining representative and overruled the company's objections, because the company had failed to support its objections. The company petitioned for review, which the Board denied. Counsel presented no adequate reason why he or at least some other attorney in his office did not respond within the time limit, so we believe the Board's disposition of the case was justified in order to effectuate the implicit congressional purpose of expeditiously resolving questions preliminary to the establishment of the bargaining relationship. *See National Labor Relations Board* v. *Douglas County Electric Membership Corporation*, 5 Cir., 1966, 358 F.2d 125, 129; *National Labor Relations Board* v. *O. K. Van Storage, Inc.*, 5 Cir., 1961 297 F.2d 74, 76.

Finally, the Board's grant of summary judgment in the unfair labor practice proceeding was justified. The Board need not relitigate issues previously considered during the representation proceeding. *See Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 162, 61 S.Ct. 908, 915, 917 (1941). Although the company presented what it termed new evidence as an excuse for another hearing, the Board acted within its discretion in refusing to hear the evidence, *see Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137, 139-40, 91 S.Ct. 599, 600 (1971), because, as the Board pointed out in its opinion, the company "made no showing that the proffered evidence could not have been produced in the underlying representation proceeding."

ENFORCED

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Case 23-CA-4257

Houston Natural Gas Corporation

and

International Union of Operating Engineers, Local No. 347, AFL-CIO

DECISION AND ORDER

Upon a charge filed on February 28, 1972, by International Union of Operating Engineers, Local No. 347, AFL-CIO, herein called the Union, and duly served on Houston Natural Gas Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on March 20, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 3, 1971, following a Board election in Case 23-RC-3666, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate[3]; and that, commencing on or about February 17, 1972,

[3] Official notice is taken of the record in the representation proceeding, Case 23-RC-3666, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enf'd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 27, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 31, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 6, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes teh following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its opposition to the General Counsel's Motion for Summary Judgment, Respondent denies the appropriateness of the unit, the validity of the election, the status of the Union as exclusive bargaining representative, and the commission of unfair labor practices. We find no merit in the Respondent's position.

On October 22, 1971, the Acting Regional Director for Region 23 issued his Decision and Direction of Election finding: Employees classified as "Operators A" are properly included in the unit; the Union is qualified to represent the employees involved and has a sufficient showing of interest to support its petition; and lead operator Kit-

chens should be permitted to vote subject to challenge. Thereafter, the Respondent filed with the Board a request for review of the Acting Regional Director's Decision. By telegram dated November 11, 1971, the Board denied the request on grounds that it raised no substantial issues. In the election which followed, of approximately 17 eligible voters, 9 cast ballots for the Union, 3 against, and 5 were challenged, the latter being insufficient to affect the results of the election. Respondent thereafter filed timely objections to conduct affecting results of the election. Although requested to do so in a letter from the Regional Director, Respondent did not submit any evidence in support of its objections. Citing *Mrs. Weaver's Salads, A Division of Dean Foods Co., Inc.*, 181 NLRB 197, and cases cited therein, the Regional Director found that the Respondent had failed to support its objections, overruled them in their entirety, and certified the Union as exclusive bargaining representative of the employees in the unit herein found to be appropriate.

Respondent filed a request for review in which it objected to the Regional Director's denial of a hearing on its objections and the imposition of a requirement that evidence in support of objections be furnished within 5 working days of the Regional Director's letter. The Board, in a telegraphic communication, denied Respondent's request for review on the ground that it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

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[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a public utility, is a Texas corporation with its principal office in Houston, Texas, where it is engaged in the transmission, distribution, and sale of natural gas to residential, commercial, and industrial customers. During the past year it had a gross volume of business in excess of $250,000. During the same period, Respondent purchased goods and materials valued in excess of $50,000 from firms located in states outside the State of Texas, which goods

[5] On July 11, 1972, approximately 2½ months after filing its Opposition to the General Counsel's Motion for Summary Judgment, Respondent filed a Supplemental Opposition stating that it is "now possessed of substantial relevant evidence" which would require a dismissal of the complaint. Thereafter, the General Counsel moved to strike this Supplemental Opposition. As the Respondent has made no showing that the proffered evidence could not have been produced in the underlying representation proceeding, or was previously unavailable to it, or that special circumstances exist warranting reexamination of the Board's determination in the representation proceeding, we grant the General Counsel's Motion To Strike.

and material were shipped directly to Respondent at its Texas location.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local No. 347, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices, employed by the Employer at its Houston Natural Gas Building, Houston Texas, excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

2. The certification

On November 16, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 23, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 3, 1971,

and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about February 8, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 17, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since February 17, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employee in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain

collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Houston Natural Gas Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 347, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices, employed by the Employer at its Houston Natural Gas Building, Houston, Texas, excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 3, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 17, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Houston Natural Gas Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engin-

eers, Local No. 347, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices, employed by the Employer at its Houston Natural Gas Building, Houston, Texas, excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Houston, Texas, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 21, 1972.

.....
JOHN H. FANNING, *Member*

.....
HOWARD JENKINS, JR., *Member*

.....
RALPH E. KENNEDY, *Member*

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOUSTON NATURAL GAS CORPORATION,[7]

Employer,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL #347, AFL-CIO,

Petitioner.

No. 23-RC-3666

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[8]

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[7] The Employer's name appears as amended at the hearing.

[8] The parties stipulated that the Employer is a Texas corporation with its principal offices located in Houston, Texas; that it is a public utility engaged in transmission, distribution, and sale

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.[9]

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of natural gas to residential, commercial, and industrial customers; and that during the preceding fiscal year, a representative period, it did a gross volume of business in excess of $250,000. The parties further stipulate that during the same period of time the Employer purchased and received goods valued in excess of $50,000 at its Texas locations directly from firms located outside the state of Texas. The parties also stipulated, and I find, that the Employer is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended. *Sioux Valley Empire Electric Association*, 122 NLRB 92.

[9] At the hearing the Employer sought to show that Petitioner's showing of representative interest was secured through the efforts or assistance of alleged Supervisor Leadman Nathan Kitchens, and was, therefore, invalid. An offer of proof to support its contention in this respect was rejected by the hearing officer. *Georgia Kraft Company*, 120 NLRB 806. The Petitioner takes the position that Kitchens is not a supervisor.

Subsequent to the hearing the parties were notified that an administrative investigation would be undertaken, and such investigation was completed. Based on such investigation, even if it should be assumed that Kitchens is a supervisor within the meaning of the Act (although as set forth in footnote 4 below I have been unable to determine from the record whether or not he is such a supervisor), I find that despite Kitchens having attended two or three, and possibly four, organizational meetings and, together with unit employees, having signed a letter directed to the Employer's Director of Labor Relations advising him that the signatories had authorized the Petitioner to represent them with regard to wages, hours, etc., that no evidence has come to light to show that Kitchens solicited any employees to sign authorization cards. Nor at any time until after nearly all the authorization cards had been signed by employees, did Kitchens even voice an opinion about the Union. On one occasion more than two weeks after valid authorization cards in excess of 30% of the unit complement had already been returned to the Petitioner, Kitchens expressed himself to em-

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[10]

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ployees as having signed the above-mentioned letter because he thought it was a good idea.

This conduct on the part of Kitchens is a far cry from the supervisors' activities in *The Wolfe Metal Products Corporation*, 119 NLRB 659, and *Desilu Productions, Inc.*, 106 NLRB 179, on which the Employer relies in its contention that managerial taint requires the dismissal of the petition. Accordingly, I find that the Petitioner is qualified to represent the Employer's employees and that it has a sufficient showing of interest to support the petition filed herein. *Associated Dry Goods Corporation*, 117 NLRB 1969, 1970; *Midland Container Corporation*, 116 NLRB 1116, 1117.

[10] The parties are in agreement as to the apropriate unit except that the Employer, contrary to the Petitioner, contends that Operators A and Lead Operator Kitchens are supervisors as defined in the Act and should be excluded.

The record reflects that the Employer currently has in its employ nine operators and apprentices, including the two apprentice operators, plus lead operator Kitchens. The Employer operates its Houston Natural Gas Building plant on a 24-hour day, 7-day week basis with three rotating shifts: the day or 1st shift being from 7:00 a.m. to 3:00 p.m. the evening or 2nd shift from 3:00 p.m. to 11:00 p.m., and the night or 3rd shift from 11:00 p.m. to 7:00 a.m. The bulk of the employees, apparently including all of the maintenance personnel, work on the day shift, and there are two operators, one of whom must be a lead operator or operator A, on each of the 2nd and 3rd shifts.

The bulk of the record is comprised of the testimony of Operating Manager Willard D. Amann. It is clear from Amann's testimony that the lead operator and operators A have no authority to hire or discharge employees or even to effectively recommend such actions. They may make recommendations to give employees raises or to promote employees, but again it is clear from Amann's testimony that such recommendations are reviewed by Amann and others in the Employer's managerial hierarchy.

The record further shows that until approximately three weeks prior to the hearing that the Employer had a chief operator, Leon Peterson, in charge of its central plant at the Houston Natural Gas Building, and that since his termination the Employer has utilized the services of Chief Operator John Wood some 40 to 50% of his time at the central plant. Wood is chief

operator at the Employer's Texas Medical Center plant, also located in Houston, Texas. No decision has yet been reached according to Amann regarding a permanent replacement of Peterson. Amann also spends about 30% of his time in the plant. The record does not reflect on which shifts Wood and Amann are occupied in the central plant or whether their time overlaps.

Amann testified that although the lead operator or operators A are in charge of the shift that he is charge of the overall operation 24 hours a day and his responsibility is to be in reach 7 days a week, and subject to call anytime.

Operator C. William S. Cochran, called as a witness by the Employer, testified that on a night shift Lead Operator Kitchens called Chief Operator Wood to have maintenance operators called out and protested to Wood that he (Kitchens) had no authority to call out maintenance operators. Wood himself came to the plant in response to Kitchens' call. Cochran also testified that on several occasions that Wood has told Operators A and the lead operator that if they have any trouble to call him or that if they need him to call him.

Apparently Operators A, B and C are so designated depending on the grade of license issued them by the City of Houston. An operator A must have a first-grade license, operator B — second-grade, and operator C — third-grade. Depending on the power generating capacity of the plant, City requirements necessitate that a first-class licensee, or operator A, be on a shift. It is implicit from the record that the Employer's central plant is of such size that it must have an operator with a first-class license on each shift. According to Cochran there is only one operator with a second-grade license, and all the other operators except himself and the apprentices, have a first-grade license. Thus, it would appear that 7 operators have a first-grade license and on operators A, and, in the case of Kitchens, a lead operator.

The record also reflects that operators A, when in charge of a shift, and the lead operator give certain directions to other operators, such as to turn off a chiller, which entails closing a valve, punching certain buttons and opening drain lines in a particular sequence which is learned by operators. Normally the A operators' and the lead operator's duty station is in the control room where they monitor the equipment. Cochran's testimony shows explicitly as to Kitchens and implicitly as to operators A in charge of a shift that they engage in manual work along with other employees. Work schedules are prepared by chief operator Wood, who also handles requisitions for materials and supplies. Wood also leaves work orders for the maintenance crew.

The record reflects that all of the operators, including maintenance and apprentices, are salaried, that they enjoy the same benefits with vacations depending on length of service with the Employer, and that the salary spread for all classifications from the lowest-apprentices — to the highest — lead operator — is $20 to $50 per month. Finally, Amann testified that operators A have the same authority in all the Employer's plants. Petitioner's Exhibit 1, a current collective-bargaining agreement entered into between the Employer and the Petitioner relating to similar personnel as in question here at the Employer's Nassau Bay plant, reflects that operators A are part of the contractual unit, as certified by the Board in Case No. 23-RC-2886, which specifically excludes "chief supervisory operators . . . and supervisors as defined in the Act."

Although the operators A may to some extent direct the work of other employees and undoubtedly are responsible for the operation of complex machinery and equipment when they are in charge of a shift, it is apparent that their relationship to other employees is more that of highly skilled employees to ones with less skill, and that whatever control they exercise derives from their greater skill, experience and responsibility. Accordingly, based on the foregoing, and the entire record, I find that operators A are not supervisors, and include them in the unit herein found appropriate. *United States Gypsum Company*, 119 NLRB 1415, 1418; and see *Cosby-Hodges Milling Company*, 170 NLRB 1137, 1138; and *Houston Sash & Door Company, Inc.*, 127 NLRB 1089, 1091-1092. I further find the record is not sufficiently clear to permit me to make a finding at this time of lead operator Kitchens' status. Accordingly, I make no determination as to him and the lead operator will be permitted to vote subject to challenge.

In view of the foregoing, I find no merit to the Employer's contention that any election directed herein should be delayed until after January 1, 1972, because of an expanding unit. The record shows that at such time the Employer will have added some 8 to 10 more employees to its complement in order to service the adjoining Tower-Thirty-Five Building which is presently under construction. However, such additional employees will be employed in the classifications already employed by the Employer, which I find to constitute a substantial and representative segment of such expanded unit, and that an election may properly be held at this time. *Meramec Mining Company*, 134 NLRB 1676, 1679-80; *The American Brass Company*, 120 NLRB 1276, 1281.

All operators A, B and C and apprentice operators, including maintenance operators and maintenance operator apprentices, employed by the Employer at its Houston Natural Gas Building, Houston, Texas, excluding all other employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[11] Those eligible

[11] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759.

shall vote whether (or not) they desire to be represented for collective-bargaining purposes by International Union of Operating Engineers Local #347, AFL-CIO.

ARTHUR SAFOS

Arthur Safos
Acting Regional Director,
Region Twenty-three

Dated October 22, 1971
at Houston, Texas

Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, Dallas-Brazos Building, 1125 Brazos, Houston, Texas 77002, on or before October 29, 1971. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HOUSTON NATURAL GAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-481

HOUSTON NATURAL GAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-B—5-B) is reported at 478 F. 2d 467. The decision and order of the National Labor Relations Board (Pet. App. 1-C—10-C) are reported at 198 NLRB No. 35; its decision in the related representation case (Pet. App. 1-D—7-D) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1973, and the Company's petition for rehearing was denied on July 13, 1973 (Pet. App. 1-A—2-A). The petition for a writ of certiorari was filed on September 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly refused to set aside a representation election because of the pro-union activities of an alleged supervisor.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2-3.

STATEMENT

On July 26, 1971, the International Union of Operating Engineers, Local 347, AFL-CIO, filed a representation petition with the Board seeking certification as the bargaining representative of all maintenance employees, operators, and apprentices and trainees employed by the Houston Natural Gas Corporation at its plant in Houston, Texas (A. 109-111).[1] The Company contended that the bargaining unit sought was inappropriate because it included lead operator Nathan Kitchens and operators "A" who, the Company alleged, were supervisors within the meaning of Section 2(11) of the Act (Pet. App. 3-D, n. 10).[2] The Company also contended that the

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[1] "A." refers to the printed appendix to the briefs in the court below.

[2] The Company, a public utility, employed 10 employees in the following work classifications: lead operator, operators A, operators B, operators C, and apprentices (Pet. App. 3-D, n. 10; A. 159). The lead operator and operators A perform identical functions and the classifications are used interchangeably (A. 120, 146, 154-155, 232). They are in charge of each shift and are responsible for maintaining the plant's operation during that shift (Pet. App. 4-D; A. 120, 122, 215). Their duties include monitoring controls, determining whether additional equipment should be placed in, or removed from, operation, to maintain the proper heating or cooling levels, and instructing other members of the shift when

Union's showing of employee interest supporting its petition[3] was invalid because it was secured through the efforts of lead operator Kitchens (Pet. App. 2-D, n.9).

Following a hearing, the Regional Director found that operators A were highly skilled employees rather than supervisors and thus properly included in the requested bargaining unit (Pet. App. 5-D). He also found that the record was not sufficiently detailed to determine whether lead operator Kitchens was a supervisor, but permitted Kitchens to vote in the election subject to challenge (*ibid.*). Finally, the Director found that, even if Kitchens were a supervisor, his activities on behalf of the Union did not taint the Union's showing of employee interest and thus require dismissal of its petition (Pet. App. 2-D—3-D, n. 9; A. 14).[4] The

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to start, stop, and operate the machinery (A. 120-121, 186, 209). Lead operators and operators A have no authority to hire or fire employees (Pet. App. 3-D, n. 10; A. 138-142, 162-163, 167-168). Nor do they have effective authority to promote employees (Pet. App. 3-D, n. 10; A. 124-126, 149-150, 181-182). Similarly, lead operators and operators A play no effective role in determining salary increases, which are granted by a compensation committee pursuant to a schedule; they are based on time worked for the Company and Operating Manager Amann's recommendations regarding the employee's performance (A. 177-181, 227). Lead operators and operators A also have no authority to discipline employees (A. 143-144, 227). All disciplinary action is initiated by the chief operator and then referred to Amann for final action (A. 144, 160). Lead operators and operators A are required to consult with the chief operator if they have problems at the plant (Pet. App. 4-D; A. 173, 205-208).

[3]The Board normally requires that a petition be supported by authorization cards signed by at least 30 percent of the employees in the bargaining unit.

[4]The Director's investigation revealed that, while Kitchens attended several Union meetings and signed a letter sent by the employees to the Company indicating that he had authorized the Union to represent him, no evidence was adduced that he solicited

Company's request for review of the Director's decision and direction of election (A. 18) was denied by the Board because it raised no substantial issues warranting review (A. 37). The Union won the ensuing election—held on November 16, 1971—by nine votes to three, with five challenged ballots, including that of Kitchens (A. 54).[5]

Thereafter, the Company filed objections to conduct allegedly affecting the results of the election (A. 38). Specifically, the Company asserted that (1) a Union representative entered the voting area while wearing a Union button; (2) a supervisor known to be a Union supporter voted in the election; and (3) a supervisor known to be a Union supporter remained in the immediate vicinity of the polling place campaigning for the Union (A. 38-39).

On November 23, 1971, the Regional Director sent Company counsel a letter advising that pursuant to Board policy the Company, as objecting party, was required to furnish evidence in support of its objections within five working days from the receipt of the letter (A. 41). The letter was received at the office of the Company's counsel on November 24 (A. 42). On December 3, having failed to receive any response from the Company, the Regional Director issued a supplemental

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employees to sign authorization cards. Although Kitchens told employees on one occasion that he signed a letter to the employer (A. 234) because it was a "good idea," this incident occurred after the Union's showing of interest had been secured. When Kitchens finally expressed his opinion about the Union, almost all of the employees had signed authorization cards (Pet. App. 2-D, n. 9).

[5]Inasmuch as the challenged ballots were insufficient to affect the election results, it was unnecessary to resolve the question whether Kitchens was a supervisor.

decision, overruling the Company's objections in their entirety and certifying the Union as bargaining representative of the unit (A. 44, 45). The Board denied the Company's request for review of the Director's action (A. 53).

Thereafter, the Company refused to bargain with the Union, and an unfair labor practice complaint issued alleging that the Company had violated Section 8(a)(5) and (1) of the Act (Pet. App. 1-C). The Board, finding that there were no issues that had not been decided in the representation proceeding, granted the General Counsel's motion for summary judgment (Pet. App. 4-C).[6] The Board ordered the Company, *inter alia,* to bargain with the Union upon request (Pet. App. 9-C).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 5-B).

ARGUMENT

Petitioner does not dispute here the Board's finding, sustained by the court below, that operators A are employees and thus properly included in the bargaining unit. It maintains only that the election process was tainted by the participation of lead operator Kitchens, whom it alleges to be a supervisor. Insofar as this

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[6] Approximately 2-1/2 months after filing its opposition to the General Counsel's motion for summary judgment, the Company filed a supplemental opposition and accompanying affidavits stating that it is "now possessed of substantial relevant evidence" which would require a dismissal of the complaint (A. 93). The Board granted the General Counsel's motion to strike the supplemental opposition on the grounds that there was no showing that the proffered evidence could not have been produced in the underlying representation proceeding, or that special circumstances existed warranting reexamination of the Board's determination in the representation proceeding (Pet. App. 4-C, n. 5).

contention is based on Kitchens' activities in aiding the Union in securing a showing of interest to support its representation petition, the Board properly rejected that contention for the reasons set forth in n. 4, *supra*. Insofar as this contention rests upon Kitchens' activities during the election itself, the contention is foreclosed by the fact that petitioner failed to supply evidence in support of its allegations in timely fashion. As the court below noted (Pet. App. 4-B): "Counsel presented no adequate reason why he or at least some other attorney in his office did not respond within the time limit, so we believe the Board's disposition of the case was justified in order to effectuate the implicit congressional purpose of expeditiously resolving questions preliminary to the establishment of the bargaining relationship." See *National Labor Relations Board* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433-434 (C.A. 5).[7]

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[7] Petitioner's contention that it was entitled to an evidentiary hearing on its objections rests on the premise that it presented material issues of fact. However, since its objections were untimely, that question is not properly presented here. Petitioner's final contention that summary judgment was improperly granted here is likewise without merit. It is well settled that, absent a showing of newly discovered or previously unavailable evidence, matters which were or could have been considered in an underlying representation case may not be relitigated in the related unfair labor practice proceeding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 162; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137, 141 (overruling *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), on which petitioner relies).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

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